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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

SOUTHGATE NELSON CORPORATION,
Petitioner,

against

ELIZABETH J. QUINN,
Respondent.

MEMORANDUM OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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Statement of the Case.

Pursuant to a declared public policy to establish a merchant marine; to develop its foreign and domestic commerce, and to provide vessels as naval auxiliaries in times of war or national emergency, the United States acquired title to certain steamships and Congress created The Maritime Commission as its agency for the establishment and continuance of trade routes, and for the charter, sale or operation of the vessels, as the case may be.

46 U. S. C. A., Sec. 1101, et sequi.

In order to keep the established lines in uninterrupted operation, pending satisfactory sale or private charter, the Maritime Commission contracted with the Southgate Nelson

Corporation to temporarily operate certain vessels on designated routes. The contract so entered into was called "Temporary Operating Agreement 1937" and expired, by its terms, in December, 1937 (R., 10).

This agreement was subsequently thrice extended, finally to March 31, 1939 (R., 79).

Among the ships operated was the "Waukegan" and on January 9, 1939 she sailed from Philadelphia bound for Baltimore via the Chesapeake and Delaware Canal.

She was so improperly loaded at Philadelphia that she was "down by the head". This caused her to get out of control and refuse to respond to her helm.

In entering the canal she sheered from right bank to left, and back again. As she approached the draw-bridge at St. Georges, Delaware, she went out of control, crashed into the bridge structure, demolished it, and killed Robert Quinn and William Oakes, the two bridgetenders.

Mrs. Quinn sued the Southgate Nelson Corporation, a private corporation of Virginia, which had the custody and control of the vessel, and which was operating it, under contract, as a private operator, as an independent contractor and actual manager of the fleet.

A jury having been waived, the trial judge found that the defendant sued was an independent contractor or agent who assumed the obligation to, and actually did, man, equip, supply and operate the vessel, and, therefore, was personally responsible for the negligence of its servants, and awarded the plaintiff damages in the sum of $20,000.00.

On appeal by defendant the findings of law and fact by the lower court were sustained and the judgment affirmed.

> Quinn v. Southgate Nelson Corp., 121 Fed. (2d) 190.

The defendant, now petitioner herein, seeks a review by this court.

The petition for certiorari, and the supporting brief (Summary of Argument, p. 7 and Point II, p. 12), are

inexcusably misleading, and is not a fair presentation of the facts.

From a reading of said petition and brief one would think that the Temporary Operating Agreement was one of the old Shipping Board agreements, commonly called the M.O.3 and the M.O.4 forms. All citations are in respect of those old contracts.

Such is not the case, and the decisions and opinions interpreting those old forms have absolutely no pertinency. Those old agreements were with so-called Managing Agents. They were strictly sub-agency contracts.

Those agreements were variously construed and interpreted by different courts, and by different Assistant Attorneys General of the United States. Some held that seamen, serving on Fleet Corporation vessels, were employees of the Managing Agent and not employees of the Fleet Corporation or of the United States; others held that such seamen were employees of the United States.

Under the name of Harry M. Daugherty, Attorney General, March 11, 1924 (34 Opin. 120), an opinion was rendered by some Assistant Attorney-General to the effect that such seamen were employees of the Managing Agent and not of the owner, the United States.

In the name of Harlan S. Stone, Attorney General, January 17, 1925 (34 Opin. 363), a diametrically contrary opinion was rendered, doubtless by some Assistant Attorney-General. We are confident that the Chief Justice will not own that 1925 opinion as his brain-child.

Those opinions were rendered in an attempt to settle the question whether such seamen came under the Federal Employees' Compensation Act or whether they could sue the Managing Agent at common law.

Thereafter the Suits in Admiralty Act was enacted, and this provided the exclusive remedy for seamen on government owned vessels.

Fleet Corporation v. Lustgarten, 280 U. S. 320.

That decision settled the matter and on September 10, 1930 the Comptroller-General of the United States, after reviewing the two opinions from the Attorneys-General, advised the United States Compensation Commission that seamen on vessels of the Fleet Corporation, operated by Managing Agents, were not employees of the United States and therefore not entitled to compensation.

> "While the Attorney-General (Stone) held that seamen of such vessels were employees of the United States within the meaning of the Employees' Compensation Act, his opinion was rendered at a time before judicial determination had so firmly established the relationship between the Merchant Fleet Corporation and the members of the crews of its vessels as being substantially the same as that existing between any private shipping corporations and the crews of their vessels, under Merchant Marine Act and the Suits in Admiralty Act."
>
> Opinion of the Comptroller-General, No. A-31684.

The "judicial determination" to which the Comptroller-General referred was the decision by this court in the Sloan Shipyards case, 258 U. S. 549, at page 567.

The Present Relationship Is Statutory.

However, all questions as to the relationship between Southgate Nelson Corporation, a private corporation of Virginia, and The Maritime Commission, and the character of the operating agreement between them, have been settled by the statute under which the Maritime Commission came into being.

46 U. S. C. A., Sec. 1101, et sequi.

That statute directed that the temporary operation of the vessels shall be by *a private operator.*

> "All vessels now being operated by private operators *shall be* temporarily operated by the Commission for its account *by private operators,* and upon such operating agreements as the Commission may deem advantageous." (Italics supplied.)
>
> 46 U. S. C. A., Sec. 1194.

Acting under the mandate of that section, the Commission formulated an agreement with Southgate Nelson Corporation. That agreement was significantly called an Operating Agreement, and this corporation was designated as the Managing Agent (R., 10). It was to manage the operations.

That agreement made the Southgate Nelson Corporation an independent contractor for it obligated it to,

a. "undertake the management and operation of the Line" (R., 11, fol. 33).

b. "manage, operate and conduct the business of the Line" (R., 12, fol. 34).

c. The vessels were allocated to the Managing Agent "for management and operation under this agreement" (R., 12, fol. 36).

d. To "manage and operate said vessels" on the named routes (R., 13, fol. 37).

e. To make certain, specific minimum sailings (R., 13, fol. 39).

f. It "shall manage and operate said vessels" exclusively under specified trade names (R., 13, fol. 39).

g. It "agrees to man, equip, victual, supply and operate the vessels" (R., 14, fols. 42-43).

h. Agrees "to a strict compliance with the minimum manning scales and minimum wage scales" (R., 15, fol. 45).

i. To exercise due diligence (R., 15, fol. 44).

j. To procure protection and indemnity insurance (R., 18, fol. 53).

This insurance was actually procured, and the Southgate Nelson Corporation as well as the Maritime Commission, were named as the insured (R., 216).

We pause here to inquire,

If the Southgate Nelson Corporation had no personal or direct liability for its own negligence, why insist that it carry liability insurance?

If the officers and crews were not regarded and considered as employees of Southgate Nelson Corporation, why procure a liability insurance policy to cover personal injury and death arising from its negligence?

The policy protects the Southgate Nelson Corporation against,

> "(1) Liability for life, salvage, and/or loss of life of, or personal injury to, or illness of, any person, excluding however . . . liability to an employee (other than a seaman) of the assured. . . ."

That clause definitely indemnifies this petitioner, and the insurance company will have to pay this judgment for the death of a non-employee. No payment will have to be made by the Maritime Commission or by the United States.

On each occasion when the agreement was extended there was a stipulation that the Southgate Nelson Corporation's original surety bond for $60,000.00 to secure faithful performance of the contract, be kept in force (R., 77-80-84). Why require a substantial bond if Southgate Nelson was a mere intermediate or subordinate agent?

Yet, notwithstanding all this clear evidence of being an independent contractor, the petitioner would seriously urge that the Southgate Nelson Corporation was a mere intermediate agent of the Maritime Commission, and that the ship's officers were only lesser employees, sub-agents, for whose negligence the Southgate Nelson Corporation would not be liable!

The petitioner is neither frank nor fair in trying to hoodwink this court with old Fleet Corporation agreements and obsolete opinions and decisions which have no relevancy here, because the Southgate Nelson Corporation was expressly made a private operator by statute. That is its inescapable category and not even the frequent waving of an old opinion, allegedly rendered by former Attorney-General, now Chief Justice, Stone, can change that category.

Despite the statute which says that, absent sale or charter, the vessels "shall be temporarily operated * * * by private operators" (46 U. S. C. A., Sec. 1194); despite the executive and managerial capacity exercised by Southgate Nelson Corporation, under the operating agreement; despite the contractual obligation to actually man the vessels; to pay minimum wages; to make minimum sailings; to provide insurance against personal injury or death, and, despite the decisions of this court which hold that an agent of the government may be held liable for its own torts, this petitioner has the temerity to picture this Virginia corporation as an "intermediate agent" between the Maritime Commission and the ship's officers, and therefore no liability attaches against the Southgate Nelson Corporation.

The fact is, and the District Court and the Circuit Court have so held, that the Southgate Nelson Corporation was an independent contractor; that it acted as a free agent in the operation of the vessels; that it exercised direct control over their operation, and that it was a responsible, individual and independent agency, holding a commanding

position over the vessels, and directly and personally liable for its own tortious conduct.

Petitioner would have this court believe that this corporation was an impotent, subordinate, subservient employee, shorn of all right and power of an executive or of a managerial nature.

It is preposterous.

The Theory of Liability.

Mrs. Quinn, the widow, sued at common law on the theory that the Southgate Nelson Corporation, as operating and managing agent of the vessel, was personally liable, as an independent agent, for its own negligence.

This theory was sustained by both the trial and appellate courts by virtue of the decisions of this court, which held that an agent was personally liable for its own torts, notwithstanding its principal might also be liable. There is a direct remedy against the agent which did the wrongful act.

> "The plaintiffs are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immunity does not extend to those who acted in its name."
>
> Sloan Shipyards v. Emergency Fleet Corporation, 258 U. S. 549, at pages 567 and 568.

See also:

Keifer & Keifer v. Reconstruction Finance Corp., 306 U. S. 381;

United States Shipping Board v. Harwood, 281 U. S. 519;

Reconstruction Finance Corp. v. Menihan, 312 U. S. 81.

Since this was not a maritime tort, the Suits in Admiralty Act had no application. Quinn and Oakes were shore workers, not members of the crew. Theirs was a common law cause of action under the state law of Delaware, the *locus deliciti.*

Mrs. Oakes, the other widow, tried to sue the United States in admiralty, but Mr. Boal, attorney for petitioner herein, acting then as attorney for the insurance company which issued the liability policy covering this accident, succeeded in dismissing the libel.

Oakes v. United States, et al., 35 Fed. Supp. 868.

Consequently, decisions like Johnson v. Fleet Corporation, 280 U. S. 320, relied on by petitioner, have no application or relevancy to this common law action.

Nor can petitioner, by persistently repeating the baseless assertion that the ship's personnel were "sub-agents," doing the work for the Maritime Commission, and were not the responsible employees of Southgate Nelson, make it so.

Nor can petitioner get much comfort from the case of *Standard Oil Co.* v. *Anderson,* 112 U. S. 215. That case is favorable to respondent for it established the rule that mere payment of wages does not determine whose servant a workman is, but the test is, who controlled his activities.

Even had the Maritime Commission paid the salaries of the ship's officers, yet, if Southgate Nelson Corporation retained the right to give them orders and to direct their activities, they were employees of Southgate Nelson Corporation.

The Del Norte, 119 Fed. 118;
Hahlo v. Benedict, 216 Fed. 303 (2).

Under the contract the duty to man the vessels, operate them, solicit and carry the freight, was exclusively upon the Southgate Nelson Corporation which was a private,

domestic corporation, chartered in Virginia and the capital of which was provided by private individuals. It was not created by Act of Congress to carry out any governmental enterprise; it was not quasi-governmental like the Fleet Corporation; its funds did not come from the public treasury, and the judgment will be paid by the insurance company, or the Southgate Nelson Corporation, and not by the federal treasury.

Therefore, when it retained and exercised control over the actions and movements of the vessels and their personnel, the ship's officers were servants and employees of the Managing Operator, and not of the Maritime Commission, even if it paid their salaries. The duty of selecting the officers was upon the Southgate Nelson Corporation (R., 15, top).

> Linstead v. Chesapeake & Ohio, 276 U. S. 28;
> Denton v. Yazoo R. R. Co., 284 U. S. 305.

Hence the contention that Southgate Nelson Corporation was a mere "intermediate agent", and that the ship's officers were merely "sub-agents" of the Maritime Commission, must yield to the decisions of this court.

We therefore ignore the cases cited in the petition with regard to subordinate servants, intermediate agents and sub-agents. The premise of intermediate agent having fallen, the argument based thereon must fall.

Petition for Certiorari Is Without Merit.

The collision with the bridge occurred in Delaware. The death of Quinn was due to common law negligence. No federal statute or law is involved. The right to recover is governed by the laws of Delaware. Even the interpretation of the operating agreement is a matter of state law.

There is no conflict between the decision of the Second Circuit and that of another circuit. There is no conflict between the Second Circuit and the decisions of this court as claimed by petitioner (Point I) but on the contrary the decision of the Circuit Court is in harmony with the Sloan Shipyard case, 258 U. S. 549; the Harwood case, 281 U. S. 519, and the Keifer case, 306 U. S. 381.

Suppose, for the purpose of the argument, that the Circuit Court gave a wrong precedent, to wit, the Greenwald case, 16 Fed. (2d) 948, for its right decision, nevertheless, if the decision was right the mere fact that a wrong reason was given would not justify overruling it.

Helvering v. Gowran, 302 U. S. 238.

The decision of the Circuit Court of Appeals is claimed (Point III) to be contrary to the alleged opinion of Attorney-General Stone in 1925! We never knew that the interdepartmental advisory opinion of Attorneys-General had the dignity and standing of a judicial precedent.

It is further claimed that said Opinion "has been relied upon by those who dealt with the Shipping Board and the Maritime Commission in making contracts, as constituting the principle of law to be applied to their construction and to the determination of the relationship between the parties" (Petition, p. 21).

Why should they do so careless a thing? Why should they follow a 1925 advisory opinion, without the force of law, and one which had been discredited by the Comptroller-General, when the present relationship, and the terms, conditions and provisions governing same, are prescribed clearly by the 1936 federal statute?

The Southgate Nelson Corporation did not follow the 1925 Opinion. The contract expressly refers to the sections of the 1936 Act which controlled the arrangements (R., 11).

It is also claimed that since the Circuit Court's decision is contrary to that opinion, the Quinn decision will disturb

the relationship between the United States and the operators of its merchant ships!

How could that 1925 opinion, based on old Shipping Board agreements, mislead or influence shipowners or operators who take their law and authority from the Act of 1936, which created the Maritime Commission?

That opinion was merely advisory. It was not a judicial determination. It was overruled by the Comptroller-General, and its theory was repudiated by this Court in the Sloan Shipyard case.

But suppose the shipowners and operators did blindly follow that opinion, would that require that this court review and overrule a correct decision by the United States Circuit Court of Appeals?

The shipowners and operators were certainly remiss if they did not consult alert attorneys and thereby learn that the opinion, issued in the name of the then Attorney-General, but doubtless prepared by some Assistant Attorney-General, had long since been overruled by the Comptroller-General, whose findings do have the force of a law in governmental departments.

Even before that (1920) this court had defined the law in respect to employees of the Fleet Corporation, and held that they were not agents of the United States but employees of the operator.

United States v. Strang, 254 U. S. 491.

The Decision of the Circuit Court Is In Accord With Recognized Legal Principles.

The petitioner, under Point II, cites text writers and cases on the proposition that an intermediate agent is not liable for the torts of a sub-agent of the principal.

Of course there is no factual basis for the hypothesis.

As between the Southgate Nelson Corporation and the ship's officers, the corporation was a principal. It was in the same category as an owner *pro hac vice.*

The Santa Cruz, 1938 A. M. C 1505.

The relationship of master and servant obtained between the Southgate Nelson Corporation and the ship's officers, notwithstanding the Maritime Commission reserved supervision over the selection of the officered personnel, and may have paid their salaries.

Metropolitan S. S. Co. v. Pacific-Alaska Co., 260 Fed. 973;
The Charlotte, 285 Fed. 84;
The Bombay, 38 Fed. 512;
Florida Grain v. Shipping Board, 300 Fed., page 172;
Noce v. Morgan Co., 106 Fed. (2d) 746 (6).

The Southgate Nelson Corporation, by statute, and under the terms of the agreement, was an independent contractor and agent, directly liable for the torts of its own employees.

Sloan Shipyards v. Emergency Fleet Corporation, 258 U. S., at pages 567, 568;
Blumenthal v. United States, 30 Fed. (2d) 247, 248;
Pennell v. Home Owners Loan, 21 Fed. Supp. 497;
The Louise Rugge, 239 Fed. 458;
Wyllis v. Palmer, 137 N. Y. 248.

Such is the rule in Delaware:

Phila. Storage Battery Co. v. Radio Corp., 194 Atl. 414 (18).

And the same rule exists in New York:

Rhynders v. Greene, 255 App. Div. 401 (2).

The question sought to be raised falls of its own inherent weakness.

Petitioner charges (Point I) that the Circuit Court was inconsistent in holding Southgate Nelson Corporation to have been an independent agent, personally liable for the torts of its employees, because it held, in the Elkton case, 86 Fed. (2d) 201, that, under the Shipping Board agency agreements, the operating company was a mere sub-agent of the Shipping Board.

The Elkton decision merely interpreted the particular contract involved in that case. The Admiral Line was appointed "General Freight Agents" for Atlantic, Gulf & Oriental Steamship Co. The Admiral Line agreed to have sub-agents at all ports where it did not have offices of its own. Certain cargo owners sued the Admiral Line, which defended, and the court held that it could recover those litigation expenses because the contract between the two steamship companies created a straight agency and the United States, as principal, had to pay.

Petitioner overlooked the Circuit Court's decision in the McCory Bros. case, that where the agreement created the relationship of *independent contractor*, that such independent contractor was individually liable for its own torts, and had to pay its own litigation expenses.

McCory Bros. v. United States, 51 Fed. (2d) 1010, at page 1013.

That view is in harmony with an earlier decision by the same court.

U. S. Shipping Board v. Greenwald, 16 Fed. (2d) 948.

The Circuit Court of Appeals followed this court's decisions in the three cases hereinbefore cited, as well as its own precedents.

The petition presents no facts or circumstances which would justify the grant of the writ.

An Error Corrected.

At the bottom of page 5 of the petition it is stated that "no claim was made in either court that the petitioner was in any respect negligent, or that it controlled or should have controlled the master, either in the loading or in the navigating of the Waukegan".

The attention of the court is invited to pages 49 and 50 of the transcript of record whereat plaintiff's counsel definitely claimed improper trim of the boat upon sailing due to negligence of ship's officers in so distributing the load as to make the vessel "down-by-the-head."

On the trial of the case the plaintiff definitely placed the responsibility for the stowage of the cargo upon the ship's officers.

> "Q. Who, on behalf of the Southgate Nelson Corporation, overlooked or supervised the loading of cargo?
>
> A. The ship's officers.
>
> Q. The ship's officers, and that also included the stowage of the cargo aboard the ship?
>
> A. Yes, sir" (Testimony of Gray, R., fol. 129).

The captain and mates were negligent; the port captain was negligent. These were all servants of Southgate Nelson Corporation, and for whose negligence the principal was liable.

The District Court and the Circuit Court made concurrent findings of fact that the defendant was negligent

in sending the vessel on a voyage when so improperly loaded that she could not be safely navigated.

This court will accept such concurrent findings as conclusive on the fact issue.

> Virginia Ry. v. System Federation, 300 U. S. 515 (1).

CONCLUSION.

The petitioner cannot be serious in asking the writ of certiorari to review a decision which is so patently right, and so in conformity with numerous adjudication of this court.

Astute counsel cannot be sincere in contending that, under the Maritime Commission Act, and the plain language of the Operating Agreement, the Southgate Nelson Corporation—a private, domestic corporation, acting solely for itself—was a mere intermediate agent of the Maritime Commission, and that the ships' officers were merely subagents.

Nor can able counsel really believe that an old opinion, even if it had been written by the present Chief Justice, could still be regarded as so sacrosanct as to prevail against a repudiation by the Comptroller-General, and a contrary adjudication by this court.

The litigation certainly should have stopped after the decision by the Circuit Court of Appeals. No federal law was involved. No federal question was in the case. The decision was sound and supported by the authority of United States Supreme Court decisions. Why further attempt to review?

The African in the woodpile is not hard to discover. His name is Bridge Damage Claim.

That explains the unmeritorious points urged in the petition. It is delay, delay, delay which the petitioner wants. It is but an effort to postpone and hinder Mrs. Quinn in

collecting her judgment, because thereby also would be postponed the day of reckoning when the government's half-million dollar bridge damage claim will have to be dealt with.

That is the only other outstanding claim.

To accomplish delay the petitioner waited until October 9th before serving respondent with the petition, although it had been filed in this court on October 1st, 1941. That was 83 days from entry of the judgment by the Circuit Court of Appeals.

Petitioner was quite willing to let interest on the judgment accumulate just to gain delay, indifferent both to the widow's rights and the expense of this brief.

It is suggested that for such stubbornly litigious and deliberately dilatory tactics, a penalty, under Rule 30 (2) of this court, should be imposed upon petitioner.

The petition itself is "so unsubstantial as to be frivolous", and to require not only denial but the imposition of a deterring penalty.

Slaker v. O'Connor, 278 U. S., at page 190;
Wagner Electric v. Lyndon, 262 U. S., at page 233;
Deming v. Carlisle Packing Co., 226 U. S., at page 106.

Respectfully submitted,

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